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In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. McLEAN, RICHARD C. BRANZELL and ROBERT PRIEKSAT,

Petitioners,

vs.

PAUL W. BERGER and EMMA R. BERGER,

Respondents.

On Writ For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Pursuant to this Court's Order dated November 9, 1998, the following questions are presented in this case:

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE COURT BELOW CORRECTLY HELD THAT LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM WHEN THEY EXECUTED THE WARRANT UPON RESPONDENTS' PROPERTY 2

A. The Ninth Circuit's Analysis And Conclusions 2

B. In Determining Whether The Fourth Amendment Has Been Violated, This Court Traditionally Examines What Protections Against Unreasonable Searches And Seizures Were Afforded By The Common Law At The Time Of Framing The Constitution 6

C. The Fourth Amendment Was Adopted By The Framers To Prohibit Abuses Of Official Power Epitomized By General Warrants And Writs Of Assistance 10

D. Given The Historical Foundations Of The Fourth Amendment, The Court Below Correctly Found That Petitioners' Conduct Constituted An Unreasonable Search And Seizure 26

II. THE COURT BELOW PROPERLY FOUND THAT PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ACTIONS 28

III. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 28

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981) 4, 5, 26

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994) ... 4, 27, 29, 30

Bell v. Clapp, 10 Johns. 263, 6 Am. Dec. 339 (Sup. Ct. 1813) 25

Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998) 2

Boyd v. United States, 116 U.S. 616 (1886) 18, 19, 23, 24

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) .. *passim*

California v. Acevedo, 500 U.S. 565 (1991) 25

California v. Hodari D., 499 U.S. 621 (1991) 8

Carroll v. United States, 267 U.S. 132 (1925) 8

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765) 23

Frank v. Maryland, 359 U.S. 360 (1959) 11

Hagler v. Philadelphia Newspapers, C.A. No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. July 10, 1996) 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Hulit v. State, No. 877-97, 1998 Tex. Crim. App. LEXIS 174 (Tex. Crim. App. Dec. 16, 1998) 13

Jenkins v. Chief Justice, 619 N.E.2d 324 (Mass. 1993) 11, 17, 20

Lo-Ji Sales v. New York, 442 U.S. 319 (1979) 11

TABLE OF AUTHORITIES – Continued

Page

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 11

Moran v. State, 644 N.E.2d 536 (Ind. 1994) 25

New Jersey v. T.L.O., 469 U.S. 325 (1985) 8

Payton v. New York, 445 U.S. 573 (1980) 9

People v. Milone, 195 N.Y.S. 488 (Sup. Ct. 1922) 25

Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) 15, 16, 26

Spangler v. Booze, 49 S.E. 42 (Va. 1904) 25

Stanford v. Texas, 379 U.S. 476 (1965) ..... *passim*

State v. Attaway, 870 P.2d 103 (N.M. 1994) 25

State v. Kinney, 698 N.E.2d 49 (Ohio 1998) ..... *passim*

Steagald v. United States, 451 U.S. 204 (1981) .. 11, 12, 18

United States v. Beckford, 962 F. Supp. 767 (E.D. Va. 1997) 25

United States v. Chadwick, 433 U.S. 1 (1977) 12

United States v. Maresca, 266 F. 713 (S.D.N.Y. 1920) 25

United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992) 24

United States v. Watson, 423 U.S. 411 (1976) 8

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 10

Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (C.P. 1763) 14, 22, 23

Wilson v. Arkansas, 514 U.S. 927 (1995) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

United States Constitution Amendment IV ..... *passim*

18 U.S.C.

§ 3105 ..... 24, 25

New York Code Criminal Procedure

§ 798 25

SUPREME COURT RULES

Rule 37.1 1

Rule 37.3(a) 1

Rule 37.6 1

SECONDARY AUTHORITIES

Akhil Reed Amar, *The Constitution and Criminal Procedure* (1997) 13

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TABLE OF AUTHORITIES – Continued

Page

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II Sir Matthew Hale, *The History of the Pleas of the Crown* 150 (First American Edition, 1847, of original English publication in 1736) 25

Richard E. Hillary, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. Tol. L. Rev. 473 (1996) 21

Jacob W. Landynski, *Search and Seizure and the Supreme Court* (1966) 9

Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937) 13, 14, 17

2 *Legal Papers of John Adams* (L. Wroth & H. Zobel eds. 1965) 17, 20

Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197 (1993) 11

Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925 (1997) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1 (1994) 10

Bruce H. Mann, *The Writs of Assistance Case*, 11 Conn. L. Rev. 353 (1979) 18

Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* (Little, Brown 1865) 18

Darren K. Sharp, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 Drake L. Rev. 149 (1997) 12

M.H. Smith, *The Writs of Assistance Case* (1978) ... 18, 19

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983) 11, 12, 21

Telford Taylor, *Two Studies in Constitutional Interpretation* (1969) 13, 18, 20

Charles H. Whitebread & Christopher Sloboggin, *Criminal Procedure* 130 (3d ed. 1993) 13

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who primarily represent plaintiffs in civil actions brought in federal and state courts. NASCAT's members litigate cases seeking to recover damages on behalf of victims of violations of antitrust, civil rights, commercial, consumer, employee and retiree benefit, environmental, insurance and securities laws, as well as violations of federal and state constitutions. Thus, NASCAT's members represent victims of corporate and government abuse, schemes to defraud, defective products and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve victims' access to justice.

NASCAT files this *amicus curiae* brief in support of Respondents and argues herein that the decision of the court below should be affirmed. Pursuant to Supreme Court Rule 37.1, NASCAT respectfully submits that this *amicus curiae* brief will bring to this Court's attention relevant matter and arguments concerning the purpose

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[1] Pursuant to Supreme Court Rule 37.3(a), letters of consent to the filing of this *amicus curiae* brief received from Petitioners' and Respondents' counsel have been filed with this Court. In accordance with Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

and meaning of the Fourth Amendment by explicating the historical context of unreasonable searches and seizures known to the Framers of the Constitution. Our review of the briefs filed in this Court by Petitioners and their *amici* indicates that they have not addressed this critical issue, which this Court has repeatedly recognized must be carefully analyzed in Fourth Amendment cases.[2]

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM WHEN THEY EXECUTED THE WARRANT UPON RESPONDENTS' PROPERTY.

A. The Ninth Circuit's Analysis And Conclusions[3]

In the court below, Respondents claimed that Petitioners Kris A. McLean (an Assistant U.S. Attorney) and Rodney C. Hanlon, Joel Scrafford, Richard C. Branzwell and Robert Prieksat (special agents of the U.S. Fish and Wildlife Service) are individually liable for damages caused by their active participation in what the Ninth

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[2] Page references to the briefs filed in this Court by Petitioners and their *amici* are stated herein as "Pet. Brief. at ___" (Brief for Petitioners), "Cable News Brief at ___" (Brief of Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann in Support of Petitioners), and "ABC Brief at ___" (Brief of *Amicus Curiae* ABC, Inc. et al. in Support of Petitioners).

[3] The opinion of the Ninth Circuit Court of Appeals in this case is reported as *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), and is reproduced in the Petition for Writ of Certiorari ("Pet. App.") at pages 1a-26a.

Circuit termed the "commercial television/law enforcement enterprise" conducted at Respondents' ranch. Pet. App. 9a [129 F.3d at 510]. Respondents contended that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. The court below held that Respondents are correct and that the federal officers are not entitled to qualified immunity. Pet. App. 9a-13a [129 F.3d at 510-12].

In reaching those conclusions, the court below noted that "[t]his was no ordinary search." Pet. App. 9a [129 F.3d at 510]. Rather,

> [i]t was *jointly planned by law enforcement officials and the media*, as memorialized by a written contract, *so that the officials could assist in the media obtaining material for their commercial programming*. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. *This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.* Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose.

Pet. App. 9a-10a [129 F.3d at 510-11] (emphasis added). After quoting the Fourth Amendment and explaining that it "protects against unreasonable searches and warrants that are obtained under false pretenses," Pet. App. 10a [129 F.3d at 511], the Ninth Circuit emphasized that "[w]e must heed its strictures on the potential abuse of law enforcement powers." *Id.*

The court below found support for its conclusions by surveying reported cases from the Second Circuit (*Ayeni*) and the Fourth Circuit (*Buonocore*) reaching the same

conclusion,[4] and distinguishing cases from the Fourth, Sixth and Eighth Circuits cited by Petitioners. Pet. App. 10a-13a [129 F.3d at 511-12]. What the Ninth Circuit correctly found most significant, however, was the Fourth Circuit's statement in *Buonocore* that while it agreed with the Second Circuit's decision in *Ayeni*, "[w]e would so hold even if there were no reported authority directly on point," *Buonocore*, 65 F.3d at 356, because

> *the historical foundations of the Fourth Amendment . . . so plainly show[ ] that "[t]he right to be free from government officials facilitating a private person's general search" was " 'manifestly included' within the 'core' Fourth Amendment protection."*

Pet. App. 11a [129 F.3d at 511] (emphasis added) (quoting *Buonocore*, 65 F.3d at 357).

The court below also cited and quoted from the decision of the Supreme Court of New York in *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981), which stated in a case in which the media was sued for trespass:

> *If the news media were to succeed in compelling an uninvited and nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists.* William Pitt, later Lord Chatham, found this unchecked intrusion so offensive to a free people that he denounced it

[4] *See, e.g., Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that qualified immunity does not protect federal officers where a Secret Service agent invited a TV news magazine into a private home to videotape a search); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (where a federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity).

> in words which again bear repetition: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter! – all his force dares not cross the threshold of the ruined tenement!"
>
> There is no consent that I am aware of, whether created by law or by custom, which permits television cameras to enter where the sovereign may not.

441 N.Y.S. 2d at 226 (emphasis added). *See* Pet. App. 11a [129 F.3d at 511].

As set forth below, in assessing whether Petitioners' conduct violated Respondents' Fourth Amendment rights, and in determining whether Petitioners are entitled to qualified immunity in this case, this Court should – as it has traditionally done in search-and-seizure cases – examine the historical foundations of the Fourth Amendment, including the American colonists' struggle against the abuses occasioned by British Crown officers' use of general warrants and writs of assistance, and conclude that Respondents' right to be free from Petitioners' facilitating the news media's general search of their home was manifestly included within the "core" protections afforded by the Fourth Amendment. Accordingly, the decision of the court below should be affirmed.

B. In Determining Whether The Fourth Amendment Has Been Violated, This Court Traditionally Examines What Protections Against Unreasonable Searches And Seizures Were Afforded By The Common Law At The Time Of Framing The Constitution

Notwithstanding the undeniable emphasis correctly placed by the court below on the "historical foundations of the Fourth Amendment," Pet. App. 11a [129 F.3d at 511], one searches Petitioners' Brief in vain for *any* analysis of the Fourth Amendment's meaning or its historical foundations and context. *See* Pet. Brief at 10-48. (The same is true of the briefs submitted to this Court by Petitioners' *amici*. *See* Cable News Brief at 10-47; ABC Brief at 3-10.) NASCAT suggests that Petitioners' oversight of this seminal point is significant because in Fourth Amendment cases, this Court has traditionally analyzed what protections against unreasonable searches and seizures were afforded at the common law at the time of the framing of the Constitution.

As in the court below, *see* Pet. App. 10a, this Court's analysis begins with the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Although the text of the amendment contains simple language,[5] courts and commentators agree that diverse events in the history of Great Britain and the United States produced that language and that what the court below termed the "historical foundations of the Fourth Amendment," Pet. App. 11a, must be analyzed and carefully heeded in evaluating the meaning and scope of the personal rights sought to be protected by the Fourth Amendment.[6]

As a result, in Fourth Amendment cases, this Court most often "look[s] to the traditional protections against

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[5] After quoting the Fourth Amendment in *Buonocore*, 65 F.3d at 353, the Fourth Circuit explained its provisions in the following passage:

> These few words contain two related concepts of particular importance here. First, by mandating that "no warrants shall issue" unless they "particularly" describe "the place to be searched" and "things to be seized," *the Framers prohibited the use of general warrants issuable to anyone*. Second, by expressly acknowledging the substantive "right of the people to be secure in their . . . houses," *the Framers recognized a person's special right to privacy, to be left undisturbed – except for reasonable searches – within his own home.*

Id. (emphasis added).

[6] Professor Maclin states that the text of the Fourth Amendment "did not emerge in a vacuum"; rather, "[s]everal centuries of British and American legal theory and practice gave shape and meaning to the Fourth Amendment." Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925, 938 (1997) ("Maclin, *Historical Review*") (citing Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1724 (1996) ("Cloud, *Searching Through History*") ("The text [of the Fourth Amendment] articulated ideas that had percolated through Anglo-American law for centuries.")).

unreasonable searches and seizures afforded by the common law at the time of the framing" of the Constitution. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (citing *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); and *Carroll v. United States*, 267 U.S. 132, 149 (1925)).[7]

Thus, *Carroll* explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable," 267 U.S. at 147, and, in holding that a warrantless car search was unreasonable unless supported by some level of individualized suspicion, this Court based its conclusion on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Id.* at 149.

Similarly, in *Wilson*, a recent unanimous opinion ignored by Petitioners (*see* note 7, *supra*), this Court conducted a lengthy examination of the common law of search and seizure to determine whether the reasonableness of a search of a dwelling depended on whether law enforcement officers announced their presence prior to entering. 514 U.S. at 931-34. After discussing English common law, learned commentary thereon, and the codification of English common law into the fabric of early

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[7] As Justice Thomas explained in *Wilson*:

> "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the [Fourth] Amendment.

514 U.S. at 931 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). Petitioners ignore *Wilson* entirely; their *amici* cite it but ignore this Court's analysis of the Framers' intent and meaning underlying the Fourth Amendment. *See* Cable News Brief at 22; ABC Brief at 7.

American statutory and case law, *id.*, Justice Thomas concluded for this Court that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.* at 934. *See also Payton v. New York*, 445 U.S. 573, 591-98 (1980) (finding no direct common law authority permitting forcible entry of the home to effectuate a warrantless arrest).

Thus, in the words of Professor Maclin, "to understand what the Fourth Amendment means today, one has to understand the meaning history impressed upon the Amendment in 1791." Maclin, *Historical Review*, 77 B.U.L. Rev. at 926.[8] As detailed below, the liberty secured by the Fourth Amendment – the right to be free from unreasonable search and seizure – "is a 'made in America' freedom, having its origins in the American colonists' battle against heavy-handed British law enforcement methods." *Id.* (citing Jacob W. Landynski, *Search and Seizure and the Supreme Court* 19 (1966) (" '[T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew

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[8] *See also* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 Stan. L. Rev. 555, 625 (1996) ("When the background purposes and underlying values for a portion of the Constitution can be discerned, these purposes and values should drive the interpretation of the text."); *Buonocore*, 65 F.3d at 353 ("Examination of the common law leading up to ratification of the Fourth Amendment reveals what is implicated in these concepts, as well as the deliberateness and significance of the choice to adopt them.").

directly out of the events which immediately preceded the revolutionary struggle with England.' ")).

C. The Fourth Amendment Was Adopted By The Framers To Prohibit Abuses Of Official Power Epitomized By General Warrants And Writs Of Assistance

Justices O'Connor, Stevens and Souter recently stated that what the Framers of the Fourth Amendment "most strongly opposed" were "general searches – that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, Stevens & Souter, JJ., dissenting) (citing, *inter alia*, William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1402, 1499, 1555 (1990) (Ph.D. Dissertation at Claremont Graduate School) ("Cuddihy, *Original Meaning*")).[9]

The account of how the protections of the home from intrusion, first established in English law, were expanded

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[9] In *Vernonia Sch. Dist.*, Justices O'Connor, Stevens and Souter cited Cuddihy's two-volume dissertation 13 times in four pages, 515 U.S. at 669-72, referring to it as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Id.* at 669. Numerous academic commentators have agreed with that description. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 928 ("Cuddihy's work is the most comprehensive and insightful study of the Fourth Amendment's history every written."); Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1712-13 (same; "The work is exhaustive; it is monumental. It is likely to become essential reading for students of the Fourth Amendment."); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1, 5 n.21 (1994) ("Maclin, *Fourth Amendment*") (same).

and given new force in America because of abuses of Crown officers in the colonies has previously been told by this Court, as well as by other courts. *See Steagald v. United States*, 451 U.S. 204, 220 (1981); *Lo-Ji Sales v. New York*, 442 U.S. 319, 325 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978); *Stanford v. Texas*, 379 U.S. 476, 482-86 (1965); *Frank v. Maryland*, 359 U.S. 360, 362-65 (1959); *see also Buonocore*, 65 F.3d at 353-56; *State v. Kinney*, 698 N.E.2d 49, 51-52 (Ohio 1998).[10] These cases recognize that the Fourth Amendment was adopted to "prohibit the abuse of official power brought about by two devices which the British Crown used in the colonies: the general warrants and the writs of assistance." *Jenkins v. Chief Justice*, 619 N.E.2d 324, 330 (Mass. 1993) (citing Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1368-71 (1983) ("Stewart, *Origins*") (reviewing the historical roots of the Fourth Amendment and of cognate provisions of certain state constitutions)). In *Steagald*, 451 U.S. at 220, this Court emphasized that "[t]he Fourth Amendment was intended partly to protect against the abuses of the

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[10] *See also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 218 (1993) ("The Court often explains that our constitutional attitudes toward governmental search and seizure power derive from the abuses generated by writs of assistance and general warrants used by British customs officials against colonial merchants and businessmen.") (citing, *inter alia*, *Marshall*, 436 U.S. at 311-12).

general warrants that had occurred in England and of the writs of assistance used in the Colonies."[11]

General warrants, which empowered their holder to seize and burn books or other printed matter deemed "offensive to the state," Stewart, *Origins*, 83 Colum. L. Rev. at 1369, " 'were the standard colonial method of search, seizure, and arrest' " by 1760. Maclin, *Historical Review*, 77 B.U.L. Rev. at 940 (quoting 1 Cuddihy, *Original Meaning*, at 460). Historically, a general warrant was primarily used to search and seize any printing press or papers critical of the King or the Parliament. These warrants failed to specify *who* or *what* was to be searched or seized, allowing government officials to arrest any persons or search anything desired if it possibly related to criticism of the King. *See Steagald*, 451 U.S. at 220.[12] Historical research indicates that the Framers' primary, if not

[11] *See also United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly used in England."); *Stanford*, 379 U.S. at 481-85 (same). In the recent words of the Supreme Court of Ohio:

> Constitutional jurisprudence has long recognized that the Fourth Amendment was drafted, in part, to bar the use of general warrants under federal power. The Constitution's framers, from experience with the use of general warrants by colonial authorities and from the long history of their use in England, viewed the devices as inimical to the principles of liberty.

Kinney, 698 N.E.2d at 51 (citing Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724-28).

[12] *See also* Darren K. Sharp, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 Drake L. Rev. 149, 152-53 (1997). The Fourth Circuit has stated that general warrants "directed at anyone were common in Great Britain up until the 1700s." *Buonocore*, 65 F.3d at 353-54 (citing

sole, concern in drafting the Fourth Amendment was avoiding a repetition of the British colonial practice of issuing general warrants or warrants based upon bare suspicion.[13] Such warrants were doubly pernicious because they not only authorized intrusions on the privacy of the colonists, they effectively prevented civil redress by shielding the executing officers from civil liability. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 932-36 (enumerating statutory and other impediments to suing a British searcher for damages).[14]

Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 24-42 (1937) ("Lasson, *History and Development*")).

[13] *See* Charles H. Whitebread & Christopher Sloboggin, *Criminal Procedure* 130 (3d ed. 1993); Telford Taylor, *Two Studies in Constitutional Interpretation* 41 (1969) ("Taylor, *Constitutional Interpretation*").

[14] *See also* Akhil Reed Amar, *The Constitution and Criminal Procedure* 13-16 (1997); *Hulit v. State*, No. 877-97, 1998 Tex. Crim. App. LEXIS 174, at *15 (Tex. Crim. App. Dec. 16, 1998).

At common law, tort suits framed as trespass or false imprisonment cases formed the primary means of penalizing and deterring unreasonable searches and seizures; however, plaintiffs bringing such actions "encountered numerous procedural obstacles that prevented these suits from becoming an effective deterrent to unreasonable intrusions." Maclin, *Historical Review*, 77 B.U.L. Rev. at 932. Cuddihy writes:

> Trespass was quite effective when a forcible search and seizure had occurred without affecting the public interest, but nearly all kinds of general warrants and searches did affect that interest. False imprisonment was actionable towards those who had instigated it but not towards the officials who enforced it, and the plaintiff had to prove that malice had motivated his arrest or imprisonment. The promiscuity of a search, arrest, or seizure constituted neither false imprison-

The Fourth Amendment not only reflected the American colonists' struggle against these oppressive devices, but also was the product of a centuries-long legal struggle in England against the use of general warrants.[15] One

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ment nor trespass, nor was it even an aggravation of either.

2 Cuddihy, *Original Meaning*, at 1219-20 (footnotes omitted). Under British law, legislation penalized an unsuccessful suit against an officer or informer by fining his antagonist double or even treble the damages sought. *Id.* at 873. Another means of shielding officers from liability was to permit them to request a retroactive finding of probable cause for a seizure. *Id.* at 876.

Many of these obstacles to successful tort suits were imported from England to the American colonies. Thus, legislation enacted in Virginia, Georgia and the Carolinas discouraged lawsuits against customs collectors, regardless of whether they had acted pursuant to a warrant, by requiring unsuccessful plaintiffs to forfeit twice the amount for which they sued. 1 Cuddihy, *Original Meaning*, at 425-29; Maclin, *Historical Review*, 77 B.U.L. Rev. at 935. Indeed, the same Congress that proposed the Fourth Amendment passed the Collection Act of 1789, which granted American officers many of the same immunities enjoyed by their British counterparts. 2 Cuddihy, *Original Meaning*, at 1542.

[15] The English Common Pleas Court's judgment in *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (C.P. 1763), provides one often-cited precedent for the Fourth Amendment's bar against general warrants. *See Stanford*, 379 U.S. at 483. The warrant at issue in that case authorized the King's officers to search for unknown individuals responsible for publishing a " 'seditious and treasonable paper, entitled, The North Briton, No. 45,' " to apprehend them and seize them and their papers. *Id.* (quoting Lasson, *History and Development*, at 43). Because the warrant named neither the individuals suspected nor a particular location where they could be found, the warrant, in effect, subjected the entire nation to possible search. The *Wilkes* court held that the warrant was illegal and awarded damages to Wilkes against Lord Hallifax, the Secretary of State who had

of the most cited reasons for opposition to general warrants was the recognition of a person's right to privacy within his own home. In *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603), the court held that not even authorized specific warrants could be executed without giving the homeowner notice (*i.e.*, without knocking before entering). Lord Coke explained that the sheriff, who was properly acting on behalf of the King, could not execute a specific warrant without notice to the homeowner because "the house of every one is to him as his . . . castle." 5 Co. Rep. at 91b, 77 Eng. Rep. at 198. Thus, even when executing a specific warrant for the King, the sheriff was required to first "signify the cause of his coming, and . . . make request to open doors." *Id.*

Moreover, in *Semayne's Case* the English court also held that it was unlawful for a sheriff to execute a warrant against the homeowner's wishes – even after

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issued the warrant. *See Kinney*, 698 N.E.2d at 52; *see also* 2 Cuddihy, *Original Meaning*, at 1221 (noting that *Wilkes* made it possible to sue not only the instigator of an unreasonable search and seizure, but also the person sent to carry it out).

Although *Wilkes* and its progeny provided significant reform, their impact should not be overstated. Professor Maclin writes:

> The rulings in those cases were directed specifically toward general warrants issued by the Secretary of State for seditious libel – "[t]he judicial assault on general warrants was selective, not categorical, for it reached only an atypical genre of those warrants." Despite these changes, other legal obstacles helped shield officers from liability: penalizing unsuccessful plaintiffs; petitioning judges to find retrospective probable cause; and pleading the general issue.

Maclin, *Historical Review*, 77 B.U.L. Rev. at 933-34 (footnotes omitted) (quoting 2 Cuddihy, *Original Meaning*, at 923-24).

knocking and announcing his presence – when the sheriff was acting "at the suit" of a private citizen, rather on behalf of the King. 5 Co. Rep. at 92b, 77 Eng. Rep. at 198 ("it is not lawful for the Sher[iff] (on request made and denial) at the suit of a . . . common person, to break the defendant's house . . . to execute any process at the suit of any subject"). Thus, in the recent words of the Fourth Circuit:

> [A]s early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to further the *government's purposes*. Even a duly authorized officer could not execute a warrant to further the purposes of a private individual. *See also Burdett v. Abbott*, 14 East 2, 156-57 (K.B. 1811).

Buonocore, 65 F.3d at 354.[16] The British court's analysis and holding in *Semayne's Case* are significant because in this case the Ninth Circuit specifically found that Petitioners' search of Respondents' home was planned to serve the purposes of the news media. Pet. App. 9a-10a [129 F.3d at 510-11].

More than a century after the common law was established in *Semayne's Case*, in exerting control over the colonies Great Britain enacted various general *writs of assistance*. "One of the chief grievances of the American colonists against England was the use of 'writs of assistance' by the King's customs officers." *Kinney*, 698 N.E.2d

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[16] *See also* William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment in the United States Constitution*, 37 Wm. & Mary Q. 371, 371-72 (1980) (explaining the Fourth Amendment, adopted in response to English and colonial violations of the privacy of the home, as an expression of the idea that "a man's house is his castle").

at 51. The writ, "although not a search warrant in the traditional sense because it did not authorize a search, was a court order to constables, peace officers, and subjects of the Crown to assist customs officers in the execution of their duties." Maclin, *Fourth Amendment*, 68 S. Cal. L. Rev. at 8.[17] Writs of assistance were a special kind of general warrant which permitted their bearer, usually a customs official, "to search with unlimited discretion for smuggled goods without special application to a court." *Jenkins*, 619 N.E.2d at 330 (citing 2 *Legal Papers of John Adams* 108 (L. Wroth & H. Zobel eds. 1965), and Stewart, *Origins*, 83 Colum. L. Rev. at 1370).[18] "The crux of the colonists' objection to these legal devices was the unchecked control over the liberty of the people which they vested in law enforcement officers." *Jenkins*, 619

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[17] Writs of assistance were used by British customs officials to facilitate enforcement of the trade laws in the American colonies. *See Kinney*, 698 N.E.2d at 51 ("Writs of assistance gave customs officials unbounded authority to seek out violations of the despised colonial tax laws."). "The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." Lasson, *History and Development*, at 54 (footnote omitted).

[18] According to the Supreme Judicial Court of Massachusetts:

> In England, the term "writ of assistance" originally referred to the process whereby a litigant in the Court of Exchequer or in Chancery would obtain the assistance of the sheriff in collecting a debt or gaining possession of property. *See* 2 *Legal Papers of John Adams* 107 (L. Wroth & H. Zobel eds. 1965).

Jenkins, 619 N.E.2d at 330 n.17. "[O]nce issued, writs of assistance were valid until six months after the death of the current monarch." *Buonocore*, 65 F.3d at 354 n.5 (citing *Jenkins*, 619 N.E.2d at 330 n.18).

N.E.2d at 330; *see also Steagald*, 451 U.S. at 220; *Stanford*, 379 U.S. at 481-85; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 20 Suffolk U. L. Rev. 53, 77-78 (1996). In the words of the Fourth Circuit, abuses associated with the use of writs of assistance were greatest among "the colonists' particular grievances against the mother country." *Buonocore*, 65 F.3d at 354; *see also Stanford*, 379 U.S. at 481 ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.").

In *Boyd v. United States*, 116 U.S. 616 (1886), this Court described at length the colonists' outrage at the writs of assistance.[19] In the famed *Paxton's Case*, argued in the Massachusetts Superior Court in February 1761,[20] James Otis presented a theory of American jurisprudence which embodied the colonists' position and formed the basis of

[19] As noted above, courts and historians have described resistance to the writs of assistance as a major cause of the American Revolution. *See Stanford*, 379 U.S. at 481-82; *Kinney*, 698 N.E.2d at 51-52; Maclin, *Historical Review*, 77 B.U.L. Rev. at 945; Taylor, *Constitutional Interpretation*, at 38; O.M. Dickerson, "Writs of Assistance as a Cause of the Revolution," in *The Era of the American Revolution* 40 (Richard B. Morris, ed. 1939).

[20] The complete citation is *Paxton's Case on the Writ of Assistance*, as reported in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* 51-57 (Little, Brown 1865). *See* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1715 n.29. The background and aftermath of the case is reviewed in M.H. Smith, *The Writs of Assistance Case* (1978) ("Smith, *Writs of Assistance*"), which has been described as "a truly exhaustive study" of the English and colonial American history dealing with writs of assistance. Bruce H. Mann, *The Writs of Assistance Case*, 11 Conn. L. Rev. 353, 355 (1979); *see also* Maclin, *Fourth Amendment*, 68 S. Cal. L. Rev. at 14 n.53.

the Fourth Amendment.[21] As this Court described the significant historical context and quoted from Otis's famous attack on these writs:

> The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."

Boyd, 116 U.S. at 625. Observing that "the famous debate" in which Otis's argument had been advanced "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country," *id.*, this Court quoted John Adams as stating: " 'Then and there . . . was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.' " *Id.*; *see*

[21] In *Paxton's Case*, Otis was counsel for a group of Boston merchants who were opposed to the writs of assistance. Because writs of assistance remained in force only until the death of the reigning monarch, when George II died on October 25, 1760, customs agents were obliged to apply to the Superior Court for new writs. *Paxton's Case* began when the merchants petitioned the Superior Court to deny the writs. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 946; 1 Cuddihy, *Original Meaning*, at 757-64; Smith, *Writs of Assistance*, at 312-86.

also Stanford, 379 U.S. at 481-82; *Kinney*, 698 N.E.2d at 51-52.[22]

James Otis, like Lord Coke before him, remonstrated against general warrants, *inter alia*, because they were not directed solely at authorized officers acting on behalf of the government *but could be executed at the request of anyone*. Moreover, Otis argued that such warrants constituted an improper invasion of a person's cherished right to privacy, particularly in his own home. *See Buonocore*, 65 F.3d at 355; *Jenkins*, 619 N.E.2d at 330-31. Although Otis's position was rejected by the Superior Court, which unanimously decided to issue new writs, *see* Maclin, *Historical*

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[22] Professor Maclin provides additional historical context for this significant event in American jurisprudence and the full text of John Adams' report:

> John Adams was a young lawyer when Otis delivered his argument in the writs of assistance case. Adams later wrote that:
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> > "Otis was a flame of fire! . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely, in 1776, he grew up to manhood, and declared himself free."

Maclin, *Historical Review*, 77 B.U.L. Rev. at 970 (quoting Letter from John Adams to William Tudor (Mar. 29, 1817)). Otis's famous attack on writs of assistance in *Paxton's Case*, derived from 2 *Legal Papers of John Adams* 134-44, is quoted at length by the Fourth Circuit in *Buonocore*, 65 F.3d at 355; *see also Jenkins*, 619 N.E.2d at 330-31. Telford Taylor writes that "[t]he writs of assistance were anathema in the colonies, and [James] Otis' argument against them was well known among the founding fathers." Taylor, *Constitutional Interpretation*, at 38.

Review, 77 B.U.L. Rev. at 947, in the ensuing years his argument was accepted by the Supreme Courts of Pennsylvania and Virginia, and by the First Congress when in 1789 it adopted the Fourth Amendment.[23] In *Buonocore*, the Fourth Circuit emphasized the significance of Otis' argument against general warrants:

> Thus, when the Framers recognized the "right of the people to be secure in their . . . houses" from "unreasonable searches" and mandated that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the things to be seized," *they rejected general warrants with all the pitfalls outlined by Otis – and*

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[23] *See* Richard E. Hillary, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. Tol. L. Rev. 473, 475-76 (1996); Maclin, *Fourth Amendment*, 35 Wm. & Mary L. Rev. at 225-26. Justice Stewart has written:

> Otis lost his case, but his side was to win the war. Throughout the colonies, opposition to the writs mounted in the wake of Otis's words, and courts proved increasingly reluctant to issue them.

Stewart, *Origins*, 83 Colum. L. Rev. at 1370-71 (footnote omitted). At the Virginia ratifying convention in 1788, Patrick Henry complained that general warrants " 'exposed any person or property to seizure " 'in the most arbitrary manner, without any evidence or reason. Everything the most sacred may be searched and ransacked by the strong arm of arbitrary power.' " ' " Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1727 n.63 (quoting 2 Cuddihy, *Original Meaning*, at 1387).

> *Lord Coke – including issuance of a warrant at the suit of a private citizen.*

65 F.3d at 355 (emphasis added).[24]

The historical record of the years immediately preceding drafting and ratification of the Fourth Amendment supports the unassailable conclusion that a consensus among colonists began to emerge rejecting broad categories of searches and seizures as unreasonable, including general searches that were conducted with or without warrants. *See* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724. The American colonists were not alone in their hatred of such abuses; indeed, a decade before the first shots were fired at Lexington and Concord, Massachusetts, the English courts already deemed general warrants unlawful. As noted above, in *Wilkes v. Wood*, an action for false imprisonment, Chief

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[24] Professor Maclin concurs:

> By the time Congress proposed the Fourth Amendment for ratification, Americans had experienced unreasonable search and seizure from many quarters. *Their desire to protect the privacy and security of their homes from promiscuous intrusion led the Framers to create a right to be free from unreasonable search and seizure. Viewing the general warrant and its close cousin, the writ of assistance, as law enforcement instruments that substantially undermined their privacy and security, Americans strongly resented them.* The origins and history of the Fourth Amendment reveal that in devising alternative methods of enforcement, legislatures and judges alike considered the specific warrant to be the best available tool to protect privacy and check the discretionary powers of officers.

Maclin, *Historical Review*, 77 B.U.L. Rev. at 954-55 (emphasis added; footnote omitted); *see also* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724, 1730.

Justice Pratt declared general warrants as "a power capable of affecting every person in the kingdom, and is totally subversive to the liberty of the subject." 98 Eng. Rep. at 498. Subsequently, in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765), an action for trespass for entering the plaintiff's house and breaking open his desks and boxes and searching through his papers in pursuit of a case for seditious libel, Lord Camden condemned the issuance of general warrants as dangerous and unconstitutional and likened them to the Spanish Inquisition. 95 Eng. Rep. at 812. In addition, Lord Camden asserted that the protection of privacy and property was the chief purpose of the law and declared that a general warrant to search a person's home and seize his papers was illegal and void. *Id.* at 818. One hundred years later, this Court characterized *Entick* as "one of the permanent monuments of the British constitution," emphasizing that the case's preeminence at the time of the Constitution's adoption rendered it persuasive on the question of the intent of the Framers of the Fourth Amendment. *Boyd*, 116 U.S. at 626-27; *see also Stanford*, 379 U.S. at 483 (discussing English court decisions in *Wilkes* and *Entick*).

Based upon the development of the law of search and seizure in England and the experience in the American colonies, the Framers gave new protection against intrusions into the home by adopting the Bill of Rights. A century later, in *Boyd*, this Court explained the significance of the Fourth Amendment in addressing whether a district court order requiring claimants to produce invoices in a forfeiture action connected to the fraudulent avoidance of importation duties comported with the Fourth and Fifth Amendments. Moving away from the English courts' conception of prohibitions against search

and seizure as based strictly upon property rights, this Court stated:

> [The Fourth Amendment applies] to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick*].

Boyd, 116 U.S. at 630.

In *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), a criminal defendant sought production of videotapes prepared by CBS News employees during a lawful search of his apartment by Secret Service agents. After reviewing the above-referenced history of the Fourth Amendment, *id.* at 156-58, Judge Weinstein emphasized that "an authorized search, while necessary, can often result in a severe and offensive violation of a person's privacy." As a result, "[p]articipation by the media in this invasion of privacy must be scrutinized carefully." *Id.* at 158. In support of this proposition, Judge Weinstein cited 18 U.S.C. § 3105, which provides that a search warrant " 'may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.*' " *Id.* (emphasis added).

The origins of § 3105 may be traced to English common law,[25] and its requirements were first noted in *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339 (Sup. Ct. 1813), an influential decision of the New York Supreme Court.[26] It was codified in 1881 in the New York Code of Criminal Procedure.[27] As part of the Espionage Act of 1917, Congress adopted New York's statute verbatim. NASCAT respectfully submits that § 3105 should be understood as a modern-day codification of one of the "core" protections against general warrants and writs of assistance embedded in the Fourth Amendment. The facts of this case, as explicated by the court below, Pet. App. at 4a-6a [129 F.3d at 508-09], can only be understood and applied by this Court through reference to the lengthy historical record of general warrants and writs of assistance under

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[25] *See* II Sir Matthew Hale, *The History of the Pleas of the Crown* 150 (First American Ed., 1847, of original English publication in 1736) (stating that warrants "ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, tho it is fit the party complaining should be present and assistant, because he knows his goods").

[26] This Court and other courts have often cited *Bell v. Clapp* as accurately reflecting the common law of search and seizure derived from English practice. *See, e.g., California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring); *United States v. Beckford*, 962 F. Supp. 767, 773 (E.D. Va. 1997); *United States v. Maresca*, 266 F. 713, 722 (S.D.N.Y. 1920); *State v. Attaway*, 870 P.2d 103, 108-09 (N.M. 1994); *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994); *Spangler v. Booze*, 49 S.E. 42, 45 (Va. 1904).

[27] *See* N.Y. Code Crim. Proc. § 798 (1882) ("A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution."); *People v. Milone*, 195 N.Y.S. 488, 490-91 (Sup. Ct. 1922).

which Crown officers "bedeviled the colonists." *Stanford*, 379 U.S. at 481. As early as 1603 – nearly four centuries ago – Lord Coke established in *Semayne's Case* that intrinsic to the validity of the specific warrant *was that it had to be executed by a properly commissioned officer to further the government's purposes, not to further the purposes of a private party, like the news media in this case*. 5 Co. Rep. at 92b, 77 Eng. Rep. at 198; *see also Buonocore*, 65 F.3d at 354. Yet, that is precisely what Petitioners did in this case; the facts in the record demonstrate that Petitioners cooperated with and facilitated the news media's general search of Respondents' home and property. Pet. App. 4a-6a [129 F.3d at 508-09]. The search "was jointly planned by [Petitioners] and the media . . . so that [Petitioners] could assist in the media obtaining material for their commercial programming. . . . *This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.*" Pet. App. 9a-10a [129 F.3d at 510] (emphasis added).

D. Given The Historical Foundations Of The Fourth Amendment, The Court Below Correctly Found That Petitioners' Conduct Constituted An Unreasonable Search And Seizure

In this case, faithfully adhering to this Court's precedents in search-and-seizure cases, the Ninth Circuit properly ascertained "the historical foundations of the Fourth Amendment." Pet. App. 11a [129 F.3d at 511]. The court below concluded that Petitioners' conduct violated Respondents' Fourth Amendment protections against unreasonable searches because their actions were " '*nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.*' " *Id.* (emphasis added) (quoting *Anderson*, 441 N.Y.S.2d at

226). Like the Fourth Circuit in *Buonocore*, the Ninth Circuit correctly held that " '[t]he right to be free from government officials facilitating a private person's general search' " was " ' "manifestly included" ' " within the 'core' Fourth Amendment protection" and that Petitioners could be held liable for violating the Fourth Amendment by allowing agents of the news media to accompany them when they executed the warrant upon Respondents' property. *Id.* (quoting *Buonocore*, 65 F.3d at 357). And like the Second Circuit in *Ayeni*, the court below emphasized that Petitioners' conduct "was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right of privacy." 35 F.3d at 686; *see* Pet. App. 9a-13a [129 F.3d at 510-12]. As Chief Judge Newman of the Second Circuit stated in *Ayeni*:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [Secret Service agent] *Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.*

35 F.3d at 686 (emphasis added). The principles elucidated by the Second Circuit in *Ayeni*, as echoed by the Fourth Circuit in *Buonocore* and by the Ninth Circuit in

the present case, are consistent with the well-settled historical foundations of the Fourth Amendment repeatedly recognized in this Court's decisions and should be resoundingly ratified by this Court.

II. THE COURT BELOW PROPERLY FOUND THAT PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ACTIONS

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court articulated the current standard for "good faith" or "qualified" immunity:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. As the court below elucidated this standard, "[r]egardless of whether a constitutional violation has occurred," Petitioners are "entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights." Pet. App. 10a [129 F.3d at 511]. As the Fourth Circuit noted in *Buonocore*, however, "there is no requirement that the 'exact right allegedly violated' be previously 'specifically recognized by a court' in order for it to be held ' " 'clearly established' " for qualified immunity purposes.' " 65 F.3d at 356-57 (citation omitted). "Rather, ' " '[c]learly established' " in this context includes not only specifically adjudicated rights *but those manifestly included within more general applications of the core constitutional principle invoked.*' " *Id.* at 357 (emphasis added) (citing, *inter alia*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In *Buonocore*, 65 F.3d at 357, the Fourth Circuit found that "[t]he right to be free from government officials facilitating a private person's general search . . . is 'manifestly included' within 'core' Fourth Amendment protection," holding that the allegation that a federal agent and deputy sheriff invited a private citizen into the plaintiff's home so that a private citizen, acting independently of government agents, could conduct a search for items that were not mentioned in the search warrant, stated a violation of a clearly established constitutional right. In *Ayeni*, 35 F.3d at 684-88, the Second Circuit had earlier reached the same result, holding that an objective, reasonable Secret Service agent could not have concluded that inviting a television crew (or any third party not providing assistance to law enforcement) to participate in the search of a private home was within Fourth Amendment requirements.[28] And in this case, after citing and discussing *Buonocore* and *Ayeni*, the court below emphasized that "no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement

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[28] In *Hagler v. Philadelphia Newspapers*, C.A. No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. July 10, 1996), Senior Judge VanArtsdalen "adopt[ed] the reasoning of the Second Circuit" in *Ayeni*, *id.* at *7, stating in relevant part:

> It should have been obvious to the [police] officers . . . that a warrant issued only in the name of the officers, for the limited purpose of searching for narcotics, did not authorize them to allow members of the media to enter a private home. A reasonable person would know that the purpose of a warrant is to facilitate proper law enforcement, not to provide a "photo opportunity." *A search warrant is simply not a press pass.*

Id. (emphasis added)

purposes, and where the videotaping and sound recording were outside the sound of the warrant." Pet. App. 11a-12a [129 F.3d at 511]. Clearly, Respondents' right to be free from Petitioners' facilitating the news media's general search of their home is "manifestly included" within "core" Fourth Amendment protection, and the court below (like the Fourth Circuit in *Buonocore* and the Second Circuit in *Ayeni*) correctly held that Petitioners were not entitled to qualified immunity in this case.

III. CONCLUSION

For the reasons stated, NASCAT respectfully submits that the decision of the Ninth Circuit should be affirmed.

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